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November 12, 2021

VIA ECF

Honorable Judge Alison J. Nathan
United States District Judge
United States District Court
Southern District of New York
40 Foley Square
New York, N.Y. 10007

Re: Salas v. Leo's Bagels Hanover Square LLC, et, al.
Civil Docket No: 21-cv-01728 (AJN)

Your Honor:

This office represents the Plaintiff in the above referenced matter. Plaintiff writes, jointly with Defendants as to Section I below, to submit this letter setting forth our views on why the Court should approve the agreed-upon settlement pursuant to *Cheeks v. Freeport Pancake House, Inc.*, 796 F.3d 199 (2d Cir. 2015). The parties have agreed to a negotiated settlement agreement ("the Agreement") after extensive settlement discussions. A Countersigned copy of the Agreement is attached hereto as Exhibit A.

Plaintiff alleges that he was employed by Defendants at Defendants' bagel restaurant. Plaintiff brought this suit alleging violations of the Fair Labor Standards Act of 1938, 29 U.S.C. § 201 et seq. ("FLSA"), violations of the New York Labor Law §§ 190 et seq. and 650 et seq. (the "NYLL"). Plaintiff alleges that Defendants engaged in numerous violations of the FLSA and NYLL, including failure to pay appropriate minimum and overtime wages and failure to provide statutorily-required wage statements and wage notices. Defendants have denied these allegations and assert several affirmative defenses.

I. The Proposed Settlement is Fair and Reasonable

Under the Agreement, Defendants will pay \$16,000.00 to settle all claims. This settlement amount will be paid in one single payment. Payment will be made within 10 calendar days of the Court's approval of the Agreement. Payment shall consist of two checks, one check made payable to Plaintiff Carlos Salas and the other check will be made payable to "Michael Faillace & Associates, P.C. as attorney for Plaintiff."

Plaintiff alleges that he is entitled to back wages from Defendants in the amount of approximately \$14,782.50. Plaintiff estimates that if he had recovered in full for his claims, exclusive of attorney's fees, he would be entitled to approximately \$52,221.78. A copy of Plaintiff's damages chart, breaking down each amount sought from Defendants, is attached hereto as Exhibit B.

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Under *Lynn's Food*, a court may approve a settlement where it “reflects a ‘reasonable compromise of disputed issues [rather] than a mere waiver of statutory rights brought about by an employer’s overreaching.’” *Le v. Sita Information Networking Computing USA, Inc.*, No. 07 Civ. 0086, 2008 U.S. Dist. LEXIS 46174 at *2 (E.D.N.Y. June 12, 2008) (quoting *Lynn's Food Stores, Inc. v. United States*, 679 F.2d 1350, 1354 (11th Cir. 1982)); *see also Kopera v. Home Depot U.S.A., Inc.*, No. 09 Civ. 8337, 2011 U.S. Dist. LEXIS 71816, at *2 (S.D.N.Y. June 24, 2011) (“If the proposed settlement reflects a reasonable compromise over contested issues, the settlement should be approved”).

Throughout the litigation, there were sharply contested factual and legal disputes that went to the heart of Plaintiff’s claims. Significantly, Defendants vigorously contested all of Plaintiff’s substantive allegations, contesting the number of hours allegedly worked by Plaintiff.

Considering the risks in this case outlined above, Plaintiff believes that this settlement is fair and should be approved. *See Meigel v. Flowers of the World, NYC, Inc.*, 2012 U.S. Dist. LEXIS 2359, at *2-3 (S.D.N.Y. Jan. 9, 2012) (“Typically, courts regard the adversarial nature of a litigated FLSA case to be an adequate indicator of the fairness of the settlement. If the proposed settlement reflects a reasonable compromise over contested issues, the court should approve the settlement.”).

II. Plaintiff’s Attorneys’ Fees are Fair and Reasonable

Under the settlement agreement, Plaintiff’s counsel will receive \$5,280.00 from the settlement fund as attorneys’ fees and costs. This represents remuneration of the filing fee incurred in filing of the Complaint and service of process, plus one third of the remainder of the recovery in this litigation. This is a reduction in fees from the provisions of Plaintiffs’ retainer agreements, which provide that forty percent of Plaintiff’s recovery will be retained by the firm. The lodestar amount, as reflected on the invoice attached hereto as Exhibit C, is \$5,037.50, including \$630.00 in costs.

The amount provided to Plaintiff’s counsel under the settlement is fair and reasonable and well within the range of fees typically awarded in cases in this Circuit. *See Castaneda v. My Belly’s Playlist LLC*, No. 15 Civ. 1324 (JCF) (S.D.N.Y. Aug. 17, 2015) (Francis, M.J.) (awarding the plaintiffs’ attorneys a contingency fee of one-third to account for risks in litigation); *see also Calle v. Elite Specialty Coatings Plus, Inc.*, 2014 U.S. Dist. LEXIS 164069 at *9 (E.D.N.Y. Nov. 19, 2014) (“A one-third contingency fee is a commonly accepted fee in this Circuit.”). In light of the nature of the issues herein, and the extensive negotiations necessary to reach the agreed-upon settlement, Plaintiff’s requested award is reasonable. *See Alleyne v. Time Moving & Storage Inc.*, 264 F.R.D. at 60; *see also McDaniel v. City of Schenectady*, 595 F.3d 411, 417 (2d Cir. 2010).

Below is a brief biography of individuals who performed billed work on behalf of Plaintiff in this matter, including the effective billable rate which the parties’ request that the Court apply should the Court undertake a “lodestar analysis of the fairness of such fees (*see, e.g., Arbor Hill Concerned Citizens Neighborhood Assoc. v. County of Albany*, 493 F. 3d 110 (2d Cir. 2007):

- i. Michael Faillace, Esq. (“MF”), was the Managing Member of Michael Faillace & Associates, P.C., which is now CSM Legal, and was in practice

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from 1983 to November 5, 2021¹. From 1983 to 2000, he was in-house Employment Counsel with International Business Machines Corporation (IBM). He taught employment antidiscrimination law as an Adjunct Professor at Fordham University School of Law beginning in 1992 and at Seton Hall University Law School from 1995 to 1998, and he is a nationally-renowned speaker and writer on employment law. He is also the author of the ADA, Disability Law Deskbook: The Americans with Disabilities Act in the Workplace, published by Practising Law Institute (PLI), and other employment law publications and presentations. His work was billed at the rate of \$450 per hour, his standard billing rate for matters paid on an hourly basis. Courts have routinely held that hourly fees of \$450, or even \$500, for counsel with Mr. Faillace's level of experience (37 years) and expertise are reasonable. *See, e.g., Manley v. Midan Rest. Inc.*, No. 1:14-cv-1369 (S.D.N.Y. March 27, 2017), Doc. No. 42 at *32, 35-37 (fees of \$500 per hour for FLSA litigator with 34 years of experience).

ii. Kevin S. Johnson was an associate at Michael Faillace & Associates, P.C. He graduated from New York Law School in 2011. He practiced as an associate at Rosenbaum & Rosenbaum, P.C. and Georgaklis & Mallas, PLLC. before joining Michael Faillace & Associates, where he worked in labor and employment law, with a focus on FLSA litigation. His work was billed at the rate of \$375 per hour and indicated by the initials "KSJ."

iii. Clela A. Errington is an associate at CSM Legal, P.C., formerly Michael Faillace & Associates. She is a 2012 graduate of New York University School of Law. She began her career at a series of small law firms focusing on labor and employment law, followed by several years providing litigation support to large law firms. She returned to litigation in 2019, joining the Jones Law Firm, P.C., and joining Michael Faillace & Associates in 2020 and CSM Legal, P.C. in 2021. Her work is billed at the rate of \$350 per hour and indicated by the initials "CE."

iv. Jorge Rivas ("PL") is a paralegal at CSM Legal, P.C., formerly Michael Faillace & Associates. He graduated from the University at Albany in May 2010 with a Bachelor of Arts in Political Science and joined the firm of Michael Faillace & Associates in May 2016. Mr. Rivas' work is billed at a rate of \$125 per hour, well within a range of rates for paralegal work that courts have routinely approved. *See, e.g., Manley, supra*, Doc. No. 42, at *37; *Gonzalez v. Scalinatella, Inc.*, 112 F. Supp. 3d 5, 29 (S.D.N.Y. 2015).

Should Your Honor have any questions or concerns regarding this settlement, the parties are happy to address them. The parties thank the Court for its attention to this matter.

Respectfully submitted,

¹ No funds will be distributed to Mr. Faillace unless an application is made to the Court on his behalf, and order is entered to that effect.

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/s Clela Errington

Clela A. Errington, Esq

CSM Legal, P.C.

Attorneys for the Plaintiff

Enclosures

cc: Defendants' Counsel (via ECF)